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***The Committee on Energy and Commerce***  
**Internal Memorandum**



June 20, 2011

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Subcommittee Hearing on “Reforming FCC Process”

The Subcommittee will hold a legislative hearing June 22, 2011, at 10:30 a.m. in 2123 Rayburn House Office Building on a discussion draft of the FCC Process Reform Act.

**Witnesses**

One panel of witnesses will testify:

1. The Honorable John Sununu, Honorary Co-Chair, Broadband for America
2. Kathleen Abernathy, Chief Legal Officer and Executive Vice President, Frontier Communications
3. Mark Cooper, Research Director, Consumer Federation of America
4. Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law
5. Randolph J. May, President, Free State Foundation
6. Brad Ramsay, National Association of Regulatory Utility Commissioners

**Background**

There is growing consensus that the Federal Communications Commission (FCC) process needs reforming. Under chairmen from both parties, the FCC has fallen into practices that weaken decision-making and jeopardize public confidence.

Chairman Genachowski told the Subcommittee at its May 13, 2011, FCC process reform hearing about recent improvements in Commission practices. He testified that the number of notices of proposed rulemaking that include the specific text of proposed rules has increased to 85 percent from 38 percent during his tenure. He said that the Commission has reduced the number of pending broadcast license applications by 30 percent and the number of satellite applications by 89 percent. He spoke of the Commission’s efforts to increase transparency and revise the *ex parte* rules, and to reduce the average delay between adoption and publication of orders to three days from 14. He also highlighted the importance of relieving burdens on industry and other stakeholders and the Commission’s steps towards eliminating unnecessary and outdated regulations.

Laudable as these achievements are, there are no statutory requirements in place to ensure that the Commission follows best practices from issue to issue and from one commission to the

next. Indeed, all commissioners testified at the May hearing that there was still room for improvement. Chairman Genachowski, for example, recognized that shot clocks providing parties and the public with a reasonable expectation of when issues will be resolved may be an “effective tool” going forward. Commissioners Copps and McDowell agreed that there should be a mechanism for a bipartisan majority of commissioners to put items on agenda meetings. And Commissioners Copps and Clyburn spoke of the need to reform the “sunshine” rules to allow the commissioners to deliberate more efficiently. Commissioner Clyburn emphasized that such reform should apply to commissioner participation in federal-state joint board meetings as well as other commissioner communications.

Another lesson from the hearing is that process reform legislation must balance the need for increased public participation and oversight of the agency with the agency’s need to act quickly and efficiently. Legislation should refine the Commission’s processes while providing the agency with some flexibility that—in the words of Commissioner McDowell—“can’t be abused.”

In line with these principles, Committee staff has prepared a discussion draft of proposed process reform legislation, summarized below. The provisions of the draft are drawn from diverse sources, such as Mr. Barton’s FCC process reform bill (H.R. 2183, 111<sup>th</sup> Cong.); the “Federal Communications Commission Collaboration Act,” introduced by Ms. Eshoo and cosponsored by Mr. Shimkus, Mr. Doyle, Ms. Matsui, and Mr. Barton (H.R. 1009, 112<sup>th</sup> Cong.); reform recommendations of the National Association of Regulatory Utility Commissioners in 2008; and the Administrative Conference of the United States’ recent work on improving agency rulemakings.

### **Section-by-Section**

Section 1. Short title.

Section 2(a). Adds section 5A to the Communications Act.

*New section 5A(a)—Rulemaking Reforms.* Before initiating a new rule making, the FCC must survey the industry with a Notice of Inquiry. Notices of proposed rulemaking must come within three years of NOIs (so the information is current), include specific text of proposed rules, and allow a minimum period for comment. Final rules must come within three years of NPRMs and follow from the specific text of the proposal. If a final rule imposes burdens on consumers or industry, the FCC must identify the market failure and consumer harm justifying the burden, perform a cost-benefit analysis, and create performance measures for its continued evaluation.

*New section 5A(b)—Transparency Reforms.* Requires the Commission to establish internal procedures to provide adequate deliberation over and review of pending orders, publication of draft orders before open meetings, and minimum public-comment periods.

*New section 5A(c)—Sunshine Reform.* Allows three commissioners to meet for collaborative discussions if they do so in a bipartisan manner with Office of General Counsel oversight. Also applies to meetings of federal-state joint boards.

*New section 5A(d)—Bipartisan Initiation of Items.* Requires the Commission to establish procedures to allow a bipartisan majority of Commissioners to put an item on the Commission's agenda.

*New section 5A(e)—Publication of Reports and Ex Partes.* Requires the Commission to seek comment on reports and establish procedures for giving the public an opportunity to evaluate *ex parte* filings before the Commission may rely on them.

*New section 5A(f)—Pending Item Publication.* Requires the Commission to establish rules regarding the publication of a list of the draft items the commissioners are currently considering.

*New section 5A(g)—Shot Clocks.* Requires the Commission to establish shot clocks for each type of proceeding it oversees.

*New section 5A(h)—Release of Documents and Reports.* Requires the Commission to release reports according a schedule it has established, and all orders within seven days of adoption. The Commission must report to Congress whenever it misses its own deadlines.

*New section 5A(i)—Biannual Scorecard.* Requires the Commission to report every six months regarding its progress meeting its shot clocks.

*New section 5A(j)—Transaction Review Reform.* Preserves the Commission's ability to review transactions but requires conditions to be: (a) narrowly tailored to remedy harms that arise as a direct result of the transaction and (b) requirements that the Commission could otherwise impose under its rule making authority. The same requirements apply to "voluntary" commitments.

*New section 5A(k)—Communications Marketplace Report.* Requires a biennial report to Congress giving a big-picture view of what's happening in the industry, the challenges for jobs and economic growth, and the Commission's agenda to address those issues.

Section 2(b). This subsection establishes the effective date of the act as 6 months from enactment and requires the FCC to establish the rules required by the act within one year of enactment. This subsection also specifies that NPRMs in existence at the time of the act's enactment are to be deemed in compliance with the rules for NPRMs.

Section 3. This section specifies that the act does not alter the general framework established by the Administrative Procedures Act and related laws, except where it does so explicitly (i.e., with regard to allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

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*If you need more information, please call Neil Fried or Nick Degani at 5-2927.*